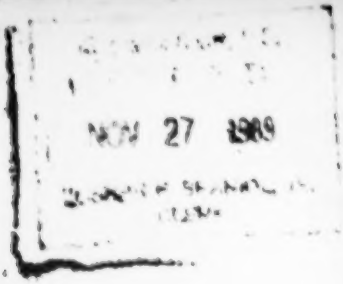
89-848



No._____

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1989

DANIEL H. KELLY,
JOHN C. LANDERS
JEFFERY ALAN McCULLOUGH,
Petitioners

versus

THE STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

VIRGIL L. BROWN
BENTLEY C. ADAMS, III
Petitioners' Attorneys

P. O. Box 388
Zebulon, Georgia 30295
(404)567-8970
(404)525-2373(Atlanta)

November 27, 1989

QUESTION PRESENTED FOR REVIEW

DO PETITIONERS' CONVICTIONS FOR "DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL" IN VIOLATION OF OFFICIAL CODE OF GEORGIA ANNOTATED § 40-6-391 OFFEND DUE PROCESS WHERE THE STATUTE CLEARLY PROVIDES NO PERSON SHALL BE GUILTY OF VIOLATING THE STATUTE "UNLESS SUCH PERSON IS RENDERED INCAPABLE OF DRIVING SAFELY AS A RESULT OF USING A DRUG OTHER THAN ALCOHOL"?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding.

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APPLICATION FOR WRIT OF CERTIORARI

JOHN C. LANDERS, DANIEL H. KELLY and JEFFERY ALAN McCULLOUGH pray that the Writ of Certiorari issue to the Georgia Court of Appeals to review the decision of the Georgia Supreme Court dated and entered September 27, 1989, (Case No. S89C0340) denying petitioners' Motion for Reconsideration of the Georgia Supreme Court's previous decision on September 7, 1989, wherein that court denied petitioners' Application for Certiorari to review the decision of the Georgia Court of Appeals (Consolidated Case Numbers A89A0673, A89A0674 and A89A0675) dated June 20, 1989. The Georgia Court of Appeals affirmed petitioners' convictions for Driving While Under the Influence of Alcohol in violation of Official Code of Georgia Annotated §40-6-391. (Another case, PROO v. STATE (Georgia Court of Appeals Case Number

A89A0610) was consolidated with petitioners' by the Court of Appeals; however, Mr. Proo is not represented by the undersigned attorneys.) Petitioners' Motion for Stay of the Remittitur pending possible review of their cases by this court was denied by the Georgia Court of Appeals on October 4, 1989. Because the record remains in the Georgia Court of Appeals it is prayed that the Writ be directed to that court.

OPINIONS BELOW

Reproduced in the appendix to this petition are: (1) the Stipulation entered into by petitioners' attorneys and the prosecuting attorney in the trial court, (2) June 20, 1989, decision of the Court of Appeals of Georgia affirming petitioners' convictions, (3) the July 7, 1989 order of the Court of Appeals of Georgia denying petitioners' Motion for

Rehearing, (4) July 25, 1989, Notice of Docketing in the Georgia Supreme Court, (5) September 7, 1989, decision of the Georgia Supreme Court denying the Petition for Certiorari, (6) September 27, 1989, decision of the Georgia Supreme Court denying petitioners' Motion for Reconsideration, (7) October 4, 1989, order of the Georgia Court of Appeals denying petitioners' Motion for Stay of the Remittiturs and (8) October 4, 1989, notices of the Court of Appeals advising of transmittal of the remittiturs.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specifically claimed under

the Constitution of the United States. The Georgia Supreme Court denied petitioners' timely Motion for Reconsideration on September 27, 1989. In accordance with Rule 20(1) of this court, this Application for Certiorari is filed within sixty (60) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

Constitution of the United States, 6th Amendment:

> In all criminal prosecutions , the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein ther crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

JOHN C. LANDERS, DANIEL H. KELLY and JEFFERY ALAN McCULLOUGH were convicted of Driving While Under the Influence of Alcohol in violation of Georgia's D.U.I. statute, Official Code of Georgia Annotated §40-6-391. Each filed a timely

Motion to Quash alleging the statute does not prohibit driving an automobile while under the influence of alcohol. In the Motions to Quash petitioners specifically complained the prosecutions violated the Fair Notice and Due Process guarantees of the 6th and 14th Amendments to the United States Constitution. Following the overuling of the Motions the petitioners entered into a stipulation with the prosecuting attorney whereby it was admitted each of the petitioners "was driving a moving vehicle while under the influence of alcohol." The stipulation permitted the appeal of the question of whether this conduct constituted a violation of §40-6-391 in view of the lanquage contained in the 1988 amendment contained in subsection (b) of the code section which provides as follows:

> The fact that any person charged with violating this Code Section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use. (EMPHASIS SUPPLIED).

Each petitioner appealed his conviction separately to the Georgia Court of Appeals; however, that court consolidated the cases and issued a single decision affirming the trial court's decision. While tacitly acknowledging petitioners' conduct was not prohibited by a literal reading of the statute, as amended, the Court of Appeals looked behind the statute and concluded such a result could not have been intended by the legislature:

"In all interpetations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. §11-3-1(a). We find that one rule of construction sufficient to resolve the issue before us in these cases. In the preamble to the act by which the statute was amended, the General Assembly stated that its purpose was "to provide the extent to which a person must be under the influence of alcohol or drugs while operating a motor vehicle in order to be in violation of the law; to provide for an exception. Ga. L. 1988, p. 1893. Comparing the old statute to the new, it is apparent that the legislature's intent was to make uniform the standards for different types of intoxication, i.e., to apply the "less safe" standard to both alcohol and drug intoxication. At the same time, the legislature clearly intended to make an exception for those persons whose intoxication is due to the ingestion of some legally possessed drug other than alcohol. That intent is reflected in the language of subsection (b). While subsection (b) may have been made perfectly clear by specifying that it applies to persons charged with violating

> subsection (a)(2) ("under the influence of any drug...") or (a)(3) ("under the combined influence of alcohol and any drug..."), and not to persons charged with violating subsection (a)(1) ("Under the influence of alcohol..."), we find it clear enough as written to permit us to discern the legislature's intent.
>
> PROO, ET AL. v. STATE, 192 Ga. App. 169 (1989) at 169-170.

REASONS FOR GRANTING THE WRIT

"[T]hat a criminal statute must give fair warning of conduct that it makes a crime" is a basic principal of due process which has been recognized by this court. BOUIE v. CITY OF COLUMBIA, 378 U.S. 347, 351-352, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964). It is a fundamental right. UNITED STATES EX REL. REED v. LANE, 759 F.2d 618, 622 (7th Cir. 1985).

"Criminal laws are more searchingly examined for vagueness, because the consequences of imprecision are more

severe than are pure economic regulation or civil legislation." LEVAS & LEVANS v. VILLAGE OF ANTIOCH, ILL., 684 F.2d 446, 452 (7th Cir. 1982). And as this court has held:

> No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commends or forbids.
>
> LANZETTA v. NEW JERSEY, 306 U.S. 451, 453, (1939).

It is of no consequence that the ordinary person would realize that a certain act is unlawful. Due process measures the law, not the knowledge of the public. In other words:

> Although it is not likely that a criminal will consider the test of the law before he murders or steals, it is reasonable that a fair warning be given to the world in lanquage that the common world

> will understand of what the law intends to do if a certain line is passed ... the line should be clear.
>
> McBOYLE v. UNITED STATES, 283 U.S. 25, 27 (1931).

The statute in question does not draw the line between criminal and non-criminal behavior with sufficient explicitedness to pass constitutional muster. This constitutional flaw cannot be rectified by statutory construction.

> Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy language, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than the other...
>
> CONNALLY v. GENERAL CONSTR. CO., 269 U.S. 347, 394 (1964).

Here, quite literally, the statute under consideration unequivocally mandates that no person charged with violating it shall be deemed guilty unless that person is rendered incapable of driving safely as a result of using a drug other than alcohol which that person is legally entitled to use. While the Court of Appeals inferred this result could not have been intended by the legislature, "[t]he due process clause requires that a criminal offense must be explicit, and not merely inferrable from the relevant statute." UNITED STATES v. PERLMUTTER, 636 F.Supp. 219, 225 (S.D.N.Y. 1986). And vagueness in a criminal statute may not be cured by statutory construction. CONNALLY, supra, 269 U.S. at 393. Importantly, even the fact that a literal application of a statute would lead to absurd results will not justify a lessening of the fair

warning requirement. UNITED STATES v. CARDIFF, 355 U.S. 174, 176 (1952).

Moreover, the decision of the Court of Appeals goes against the grain of the overwhelming body of law established by the decisions of the appellate courts of Georgia. If, as the Court of Appeals concluded, the statute was unambiguous it must be taken to mean what has been clearly expressed and no room for construction exists. SEABOARD COAST LINE RAILROAD v. BLACKMON, 129 Ga. App. 342, 344, 199 S.E.2d 581, 583 (1973); TABB v. STATE, 250 Ga. 317, 297 S.E.2d 227 (1982); THOMPSON v. GEORGIA POWER CO., 73 Ga. App. 578, 37 S.E.2d 622 (1946); FRAZIER v. SOUTHERN RAILWAY, 200 Ga. 590, 37 S.E.2d 774 (1946); JESUP v. BENNETT, 226 Ga. 606, 176 S.E.2d 81 (1970): ATLANTA & W.P.R.R. v. WISE, 190 Ga. 254, 9 S.E.2d 63 (1940). While the Georgia Supreme Court has recognized the courts

could sometimes better legislation by rejecting some of the words delivered to them by the legislature, it has nonetheless concluded this they have no power to do. BUTTERWORTH v. BUTTERWORTH, 227 Ga. 301, 180 S.E.2d 549 (1971). Words used in a statute should be accorded their usual and ordinary signification. CROOK v. STATE, 156 Ga. App. 756, 757-58, 275 S.E.2d 794, 796 (1980); RISER v. CITY OF THOMASVILLE, 248 Ga. 866, 286 S.E.2d 727 (1982). "Shall" is in its ordinary signification a word of command. STATE v. BRANTLEY, 147 Ga. App. 569, 570, 249 S.E.2d 365, 366-367 (1978).

The Georgia courts themselves have recognized that they are not necessarily free to substitute the meaning thought intended by the legislature when the terms of a criminal statute are involved:

> [W]hen a criminal statute is reasonably subject to two constructions, one of which would make an act criminal and one which would not, such statute must be strictly construed in favor of the accused and strictly against the State.
>
> CARSELLO v. STATE, 220 Ga. 90, 94, 137 S.E.2d 305, 307-8 (1964).

And as the Georgia Supreme Court has more recently stated:

> A fundamental requirement of a criminal statute is that it give "fair wairning" of what conduct is criminal. Further it must not be so vague, uncertain, or ambiguous as to make it probable that ordinary people of equal intelligence could misconstrue its meaning.
>
> KING v. STATE, 246 Ga. 386, 387, 271 S.E.2d 630, 632 (1980).

From these decisions it is clear the decision complained of was rendered in contravention of the established law of the State of Georgia. As this court has

held the failure of a state to follow the dictates of its laws to the detriment of the accused results in a denial of due process in violation of the 14th Amendment. HICKS v. OKLAHOMA, 447 U.S. 343 (1980); GREENHOLTZ v. INMATES, 442 U.S. 1 (1979).

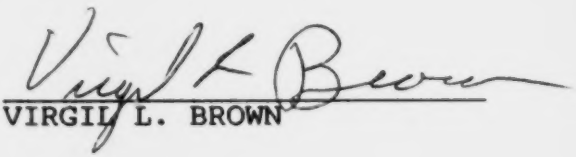
CONCLUSION

This application for certiorari merits acceptance not only because of the undeniable misapplication of the established law of this state but also the Georgia courts' disregard of the constitutional limitations pronounced by this court on the power of courts to construe penal statutes. The Georgia Court of Appeals avoided altogether petitioners' constitutional arguments concluding those objections had been waived because the appeal was limited to "the construction" of the statute in question. This was despite petitioners specifically arguing at each stage of the proceedings that to construe the statute so as to criminalize the conduct attributed to them was violative of the due process clause of the 14th Amendment. By failing to review the Court of Appeals' decision the Georgia Supreme

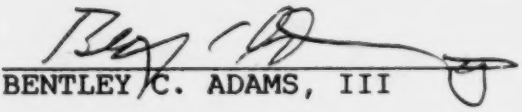
Court left standing a decision which holds that the courts of this state are free to construe penal statutes in a manner wholely inconsistant with the dictates of the Constitution of the United States.

This application for certiorari presents an issue which, if left unresolved, poses a grave threat to the integrety of the judiciary. For as long ago expressed by the first Chief Justice of this Honorable Court: "It would be dangerous, indeed, to carry the principal, that a case which is within the reasoner mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." UNITED STATES v. WILTBERGER, 18 U.S. 76, 96 (1820). For this Court to simply join the Georgia

courts in ignoring the issues properly raised by these petitioners would do an injustice not only to these petitioners but to the tradition of judicial integrety so firmly established in this Court's history.



VIRGIL L. BROWN



BENTLEY C. ADAMS, III

Attorneys for Petitioner

VIRGIL L. BROWN & ASSOCIATES
Courthouse Square
P. O. Box 388
Zebulon, Georgia 30295
(404) 567-8970

CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Petition for Writ of Certiorari upon MICHAEL J. BOWERS, Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon GRIFFIN E. HOWELL, III, Solicitor of the State Court of Spalding County, P. O. Box 551, Griffin, Georgia 30224, by depositing the same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 22nd day of November, 1989.

BENTLEY C. ADAMS, III

APPENDIX

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IN THE STATE COURT OF SPALDING COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
vs	*	
	*	
DANIEL H. KELLY	*	S88R-2416
	*	
JOHN C. LANDERS	*	S88R-2189
	*	
JEFFREY ALAN McCULLOUGH	*	S88R-2507
	*	

STIPULATION

COMES NOW Counsel for both State of Georgia and Defendant and enters into the following stipulation:

1. Defendant admits and State of Georgia stipulates that Defendant was driving a moving vehicle while under the influence of the drug alcohol and was not under the influence of any drug other than alcohol and further that he was rendered incapable of driving safely as a result

of using the drug alcohol which he was legally entitled to use.

GROUNDS FOR APPEAL

Defendant submits that alleged conduct in violation of O.C.G.A. § 40-6-391 (a)(1) is protected from criminal punishment by the exception stated in O.C.G.A. § 40-6-391(b).

Both Defendant and State agree that the above case will be Appealed to the Georgia Court of Appeals based upon whether Defendant's alleged conduct in violation of O.C.G.A. § 40-6-391(a)(1) is protected from criminal punishment by the exception stated in O.C.G.A. § 40-6-391 (b).

Stipulated and agreed to this the 30 day of November, 1988.

By: /s/Virgil L. Brown
VIRGIL L. BROWN

P. O. Box 388
Courthouse Square
Zebulon, Georgia 30295
(404)567-8970

By: /s/ John Newton, Jr.
JOHN NEWTON, JR.

P. O. Box 133
Griffin, Georgia 30224
(404)227-9456

June 20, 1989

In the Court of Appeals of Georgia

A89A0610. PROO v. THE STATE. 68.

A89A0673. LANDERS v. THE STATE. 75A.

A89A0674. KELLEY v. THE STATE. 75B.

A89A0685. McCULLOUGH v. THE STATE. 76C.

DENHAM, Judge.

Appellants were all convicted of DUI. Their appeals have been consolidated because they all rely exclusively on the same defense and there are no other issues involved in these appeals.

The essence of the position taken by appellants is that the legislature, in the 1988 amendment to OCGA § 40-6-391, repealed the prohibition against driving under the influence of alcohol. We do not find the legislature's language susceptible of the interpretation

appellants have placed on it, but even assuming it to be ambiguous in meaning, application of the rules of statutory construction mandates an interpretation at odds with appellants' reading of the statute.

Prior to the 1988 amendment, the statute read as follows: "(a) A person shall not drive or be in actual physical control of any moving vehicle while: (1) Under the influence of alcohol; (2) Under the influence of any drug to a degree which renders him incapable of driving safely; (3) Under the combined influence of alcohol and any drug to a degree which renders him incapable of driving safely; or (4) There is 0.12 percent or more by weight of alcohol in his blood. (b) The fact that any person charged with violating this Code section is or has

been legally entitled to use a drug shall not constitute a defense against any charge of violating this code section."

After the amendment (Ga. L. 1988, p. 1893, § 2), the statute read as follows: "(a) A person shall not drive or be in actual physical control of a moving vehicle while: (1) Under the influence of alcohol to the extent that it is less safe for the person to drive; (2) Under the influence of any drug to the extent that it is less safe for the person to drive; (3) Under the combined influence of alcohol and any drug to the extent that it is less safe for the person to drive; or (4) The person's alcohol concentration is 0.12 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such

driving or being in actual physical control ended. (b) The fact that any person charged with violating this Code section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use."

"In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." OCGA § 11-3-1 (a). We find that one rule of construction sufficient to resolve the

issue before us in these cases. In the preamble to the act by which the statute was amended, the General Assembly stated that its purpose was "to provide the extent to which a person must be under the influence of alcohol or drugs while operating a motor vehicle in order to be in violation of the law; to provide for an exception. Ga. L. 1988, p. 1893. Comparing the old statute to the new, it is apparent that the legislature's intent was to make uniform the standards for different types of intoxication, i.e., to apply the "less safe" standard to both alcohol and drug intoxication. At the same time, the legislature clearly intended to make an exception for those persons whose intoxication is due to the ingestion of some legally possessed drug other than alcohol. That intent is

reflected in the language of subsection (b). While subsection (b) may have been made perfectly clear by specifying that it applies to persons charged with violating subsection (a) (2) ("under the influence of any drug...") or (a) (3) ("Under the combined influence of alcohol and any drug..."), and not to persons charged with violating subsection (a) (1) ("Under the influence of alcohol..."), we find it clear enough as written to permit us to discern the legislature's intent.

"It is the duty of the court to consider the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not contemplated by the legislature.' [Cits.]" Barton v. Atkinson, 228 Ga. 733, 739 (187 SE2d 835) (1972). To adopt

appellant's proposed construction of the statute would result in the absurd consequence of repealing the statutory prohibition against driving under the influence of alcohol in the same act in which the legislature established the extent of such influence necessary to make driving illegal. As was pointed out in the excellent amicus curiae brief filed by the Attorney General on behalf of the Georgia Department of Public Safety, if the legislature had chosen to make drunk driving legal, it would not have gone to the trouble of revising the language of subsection (a) (1) while simultaneously rendering it void.

In sum, the intent of the legislature in amending OCGA § 40-6-391 was clearly not the repeal of criminal sanctions for driving under the influence

alcohol of alcohol. Appellant's defense based thereon was properly rejected by the trial court.

Although appellants have contended in one enumeration of error that the statute, as amended, is unconstitutional, that argument, as to each case, either was not raised in the trial court or was waived by stipulations that the only issue on appeal would be that of statutory construction.

Judgments affirmed. Deen, P.J., and Birdsong, J., concur.

COURT OF APPEALS

OF THE STATE OF GEORGIA

Atlanta, July 7, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed.

A89A0673. John C. Landers v. The State.

A89A0674. Daniel H. Kelley v. The State.

A89A0675. Jeffrey Alan McCullough v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta July 7, 1989

I certify that the above is a true

extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/Victoria McLaughlin CLERK

SUPREME COURT
STATE OF GEORGIA
State Judicial Building
Atlanta 30334

July 25, 1989

Thomas O. Marshal Chief Justice
Harold G. Clarke, Presiding Justice
George T. Smith
Hardy Gregory, Jr.
Charles L. Weltner
Richard Bell
Willis B. Hunt, Jr.
Justices

Joline B. Williams Clerk
Wm. Scott Henwood, Reporter

CASE NO. S89C0340
JOHN C. LANDERS ET AL. V. THE STATE

A Petition for Certiorari in Court of Appeals Cased NO. A89A0673 has been docketed in the Supreme Court today and assigned the case number show [sic] above.

Responses to petition for certiorari are encouraged and should be filed within ten days of docketing (See Rule 33).

Joline B. Williams, Clerk
By: /s/Nathaniel J. [illegible]

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 07, 1989

MR. ERIC D. HEARN

VIRGIL L. BROWN & ASSOCIATES

P. O. BOX 388

COURTHOUSE SQUARE

ZEBULON GA 302950000

Case No. S89C0340 -

JOHN C. LANDERS ET AL. V. THE STATE

(COURT OF APPEALS CASE NUMBER: A89A0673)

The Supreme Court today denied the petition of certiorari this case. [sic]

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS, CLERK

Clerk's Office, Supreme Court of Georgia

Atlanta 9/27/89

The motion for a rehearing was denied today:

Case No. S89C0340 Landers et al. v. the State.

Yours very truly,

MRS. JOLINE B. WILLIAMS, CLERK

Court of Appeals

of the State of Georgia October 4, 1989

Atlanta

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A89A0673. JOHN C. LANDERS v. THE STATE

A89A0674. DANIEL H. KELLEY v. THE STATE

A89A0675. JEFFREY ALAN McCULLOUGH v. THE STATE

Upon consideration of appellant's motion for stay of remittiturs, it is ordered that said motion be and the same is hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta Oct 4, 1989

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of

said court hereto affixed the day and year last above written.

/s/Victoria McLaughlin
Clerk